IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 1163 1

EWALD B. NYQUIST, as Commissioner of Education of the State of New York; JOSEPH W. MCGOVERN, EVERETT J. PENNY, ALEXANDER J. ALLAN, JR., CARL H. PFORSHEIMER, EDWARD M. M. WARBURG, JOSEPH T. KING, JOSEPH C. INDELICATO, HELEN B. POWER, FRANCIS W. MCGINLEY, KENNETH B. CLARK, HAROLD E. NEWCOMB, THEODORE M. BLACK, WILLARD A. GENRICH and EMLYN I. GRIFFITH, constituting THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Petitioners,

against

SUPHI SURMELI, GEVHER TURKAN ATAYALVAC, CEVAT NEZIROGLU, NEJAR CAGINALP, ALI MUSHIN TOSYALI, SUNGER TECE, SEMIH H. GUNDAY, and ALI GOKHAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- .....

EWALD B. NYQUIST, as Commissioner of Education of the State of New York; JOSEPH W. MCGOVERN, EVERETT J. PENNY, ALEXANDER J. ALLAN, JR., CARL H. PFORSHEIMER, EDWARD M. M. WARBURG, JOSEPH T. KING, JOSEPH C. INDELICATO, HELEN B. POWER, FRANCIS W. MCGINLEY, KENNETH B. CLARK, HAROLD E. NEWCOMB, THEODORE M. BLACK, WILLARD A. GENRICH and EMLYN I. GRIFFITH, constituting THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Petitioners,

against

SUPHI SURMELI, GEVHER TURKAN ATAYALVAC, CEVAT NEZIROGLU, NEJAR CAGINALP, ALI MUSHIN TOSYALI, SUNGER TECE, SEMIH H. GUNDAY, and ALI GOKHAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the Commissioner of Education of the State of New York, and the members of the Board of Regents of the University of the State of New York respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered herein on November 24, 1974.

Opinions Below

The decision of the Court of Appeals was rendered without opinion and is not yet reported. A copy of that Court's order of affirmance is appended hereto at page 1a. In announcing its decision, the presiding judge stated that the Court was affirming upon the opinion of the District Court for the Southern District of New York. The District Court opinion is reported at 412 F. Supp. 394 and is appended at page 3a. The judgment of the District Court is appended at page 10.

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on November 24, 1976. The jurisdiction of this Court to review that judgment rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Were respondents estopped from challenging the constitutionality of the statutes and regulations at bar by accepting their benefits?

2. Did the Courts below err in failing to address themselves initially to a non-constitutional question, *viz.* whether the challenged statutes and regulations infringed a federally pre-empted area?

3. Are State statutes and regulations which require an alien licensed as a physician to become naturalized within ten years, a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

Constitutional Provisions, Statutes and Regulations Construed

United States Constitution, Article I, § 8 provides in pertinent part:

> "The Congress shall have the power • • • to establish a uniform Rule of Naturalization • • •"

United States Constitution, Article VI, provides in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Amendment XIV, § 1 provides in pertinent part:

> "• • • nor shall any State deprive any person of • • • liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Education Law § 6524(6) provides:

> "To qualify for a license as a physician, an applicant shall fulfill the following requirements: (6) Citizenship: be a United States citizen or file a declaration of intention to become a citizen unless such requirement is waived, in accordance wtih the commissioner's regulations . . ."

New York Education Law former § 6509 provides:

> "There shall be issued to an applicant who, when admitted to the licensing examination, was a citizen of

a foreign country, and who had declared intention of becoming a citizen of the United States, upon passing the examination, a license but upon failure of such licensee within ten years from the date of such declaration of intention to furnish evidence that he has become a citizen his license shall terminate and his registration shall be annulled."

8 NYCRR § 24.7 provides:

"24.7 Extension of a professional license. For the extension of a professional license for time in which to complete requirements as to the United States citizenship, not exceeding two years, the Committee on the Professions may accept satisfactory evidence of personal or family illness or other extenuating circumstances."

Statement of the Case

Petitioners seek review of a judgment of the Court of Appeals for the Second Circuit which affirmed a judgment of the District Court for the Southern District of New York (Hon. Edward Weinfeld, J.) declaring unconstitutional as in violation of the Equal Protection Clause of the Fourteenth Amendment, N.Y. Education Law § 6524(6), former § 6509 and 8 NYCRR 24.7 which provide, that aliens licensed as physicians are subject to having their licenses revoked unless they acquire United States Citizenship within ten years (1a).*

The facts of this case are not in dispute.

Plaintiffs are resident alien physicians presently licensed to practive medicine in the State of New York (3a). Under N.Y. Education Law § 6524(6) to be licensed as a physician, one must either be a citizen unless that requirement is waived in accordance with the Commissioner of Education's regulations, 8 NYCRR §§ 24.7, 60.9.

* Numbers in parentheses followed by "a" refer to pages of the Appendix.

Under former § 6509, an alien physician so licensed would be required to exhibit proof of United States citizenship within ten years or such license would be subject to cancellation. This requirement was transferred to the Commissioner's regulations, see 8 NYCRR § 24.7 as part of the recodification of the New York Education Law. See L. 1971, C.987, eff. September 1, 1971.

Unless plaintiffs submit proof that they have assumed United States Citizenship, within ten years of their licensure (unless such requirement is deferred or waived, 8 NYCRR §§ 24.7, 60.9) their licenses would be subject to cancellation (3-4a).

Suing under the civil rights law, 42 U.S.C. § 1983 and 28 U.S.C. § 1343 as well as claiming federal questions, 28 U.S.C. § 1331, plaintiffs alleged that the licensing statute and regulations thereunder denied them due process, the equal protection of the laws and interfere with the federal naturalization laws, they sought a judgment declaring the statute and regulations thereunder null and void (4a).

The defendants, consisting of the Commissioner of Education, the members of the Board of Regents of the University of the State of New York, the State and its Education Department,* contended that having accepted licensure plaintiffs were estopped from challenging the conditions of licensure imposed under the statute and regulations (4a); that the statutes and regulations neither infringed federal power over immigation and naturalization had denied the plaintiffs the equal protection of the laws (7a).

* The State of New York and the State Education Department were dismissed from the action by reason of their sovereign immunity (9a) and are not petitioners herein.

The District Court rejected the claim of estoppel (4-5a) and held the statute and regulations unconstitutional, largely on the authority of *In re Griffiths*, 413 U.S. 717 (1973). The court refused to address itself to defendants' contention that the non-constitutional question of federal supremacy, which it was argued, should have been dealt with before reading plaintiffs' "equal protection" claims (8a).

An appeal was taken to the Court of Appeals for the Second Circuit which summarily affirmed the District Court (1a).

Reasons for Granting the Writ

I.

In overruling petitioners' contention that respondents were estopped from challenging the statutory scheme under which they had applied for and had accepted licensure, the courts below have decided an important question of law which has not been, but should be, settled by this Court.

This Court's past decisions have produced conflicting authority on this point, Cf. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 323, 348 (1936), which precluded a challenge where a statute's benefits have been accepted, with *W.W. Cargill Co.* v. *Minnesota*, 180 U.S. 452, 468 (1901), *contra*. In its most recent comment on this issue, this Court has only underscored the uncertainty that exists over whether the beneficiary of a statute may challenge its constitutionality, see *Arnett* v. *Kennedy*, 416 U.S. 134, 153 (1975).

This question is obviously one of substantial public importance. The sheer volume of constitutional litigation faced by government at every level is large enough. It should not, we urge, be necessary to defend lawsuits brought by individuals who wish to "have their cake and

eat it too." Principles of equity should preclude a challenge to a law by those who have accepted the statute's benefits.

II.

The refusal of the lower courts to address themselves to the statutory "Supremacy Clause" issue was a serious error and violated a well-established rule set down by this Court. See e.g. *Peters* v. *Hobby*, 349 U.S. 331, 338 (1955); *Hagans* v. *Lavine*, 415 U.S. 528, 536, 543-544 (1974). Despite the presence of a non-constitutional issue in the case, the District Court and the Court of Appeals proceeded to consider only the constitutional questions, the District Court stating that its disposition made it "unnecessary to consider plaintiffs' further argument that the act is unconstitutional [sic] because it interferes with exclusive federal powers over aliens" (9a). In doing so, the lower courts committed serious error requiring supervisory intervention by this Court.

The most recent decisions of this Court involving aliens' rights have reemphasized the requirement that non-constitutional issues be determined first, *Examining Board of Engineers, Architects and Surveyors* v. *DeOtero*, —— U.S. ——, 44 U.S.L.W. 4890, 4899-4900 (1976); *DeCanis* v. *Bica*, —— U.S. ——, 44 U.S.L.W. 4235, 4239 (1976); *Mathews* v. *Diaz*, —— U.S. ——, 44 U.S.L.W. 4748, 4753 (1976); *Hampton* v. *Mow Sun Wong*, —— U.S. ——, 44 U.S.L.W. 4737, 4738-4739 (1976). In the interests of comity and federalism, the lower courts should not have reached the constitutional issues unless they were unavoidable.

III.

This case presents yet another important question not heretofore decided by this Court.

Unlike the statutes struck down in *Graham* v. *Richardson*, *supra*, which barred all aliens who were not residents for at least fifteen years from welfare benefits, *Sugarman* v. *Dougall*, 413 U.S. 1634 (1973) which placed an absolute bar against employment of aliens in all civil service jobs, *In re Griffiths*, 413 U.S. 717 (1973) which barred aliens from the practice of law, or the recently decided *DeOtero* case, *supra*, which barred aliens from the private practice of engineering, the statutes under review herein do not prevent aliens from being licensed to practice medicine. The plaintiffs at bar are perfect illustrations. Their alienage posed no barrier to their licensure. No "irrebutable presumption" of unfitness, cf. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), was used to their detriment. Since N.Y. Education Law §§ 6524(6) and 6509 do not involve an absolute denial of a privilege because of alienage, cf. *DeOtero*, *supra* at 44 U.S.L.W. 4489, the traditional "rational relationship" test, see e.g. *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961) would be used in determining constitutionality. The Courts below have erroneously read this Court's decisions as barring any state statutory provision referring to aliens, a conclusion which appears to us to be contrary to the careful delimitation in such cases.

Under its statutory scheme, the State of New York permits any qualified alien to become licensed to practice medicine. It does, however, require that within the time that one would expect a professional to become established in practice that he demonstrate a political commitment to this country and the community within which he resides and practices his profession.*

The organization and delivery of health care are matters of concern to the community and necessarily enter into the political sphere. Matters of public policy involving regulation of abortion, definition of death, withdrawal of care

---

* This requirement is waived in special circumstances, 8 NYCRR § 60.9.

to the hopelessly ill, to name a few, are questions upon which members of the medical profession ought to be heard and to fully participate when political and legal decisions are made. As aliens, plaintiffs cannot possibly participate fully in the affairs of the community. The State therefore has a vital interest in encouraging their full participation, as well as for the general reason that those who are educated, talented and esteemed in the community should be encouraged to participate in public affairs.

Since the State may define its political community and establish citizenship as a qualification for full civic participation, *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 642-643; *Dunn* v. *Blumstein*, 405 U.S. 330, 334 (1972). *Kramer* v. *Union Free School District*, 395 U.S. 621, 626 (1969), it may adopt what it deems an effective method to achieve that end, *Rosario* v. *Rockefeller*, 410 U.S. 752, 762 n. 10 (1973).

Moreover, a political commitment to the United States will tend to promote stability in the treatment of patients in plaintiffs' respective communities. An alien physician who remains a "sojourner" rather than become a citizen is more likely than the latter to remove from the country, leaving his patients to become familiar with another doctor. Plaintiffs' increased skills and experience as acquired over the years is a compelling reason why the State should be permitted to encourage them to remain and be naturalized. The lower courts' rationale thus supports petitioners' position.

CONCLUSION

Certiorari should be granted.

Dated: New York, New York
February 18, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of November, one thousand nine hundred and seventy-six.

Present: HON. WALTER R. MANSFIELD
HON. ELLSWORTH A. VANGRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges,

76-7291

Suphi Surmeli, Gevher Turkan Atayalvic, Cevat Neziroglu, Nejar Caginalp, Ali Muahin Tcsyali, Sunger Tece, Semih H. Gunday, and Ali Gokhan,

Plaintiffs-Appellees

v.

The State of New York, New York State Education Department, Ewald B. Nyquist, as Commissioner of Education of the State of New York, Joseph W. McGovern, Ererett J. Penny, Alexander J. Allan, Jr., Carl H. Pforzheimer, Edward J. J. Warburg, Joseph T. King, Joseph C. Indelicato, Helen B. Power, Francis W. McGinley, Kenneth B. Clark, Harold E. Newcomb, Theodore M. Black, Willard A. Genrich and Emlyn I. Griffith, constitutiing The Board of Regents of the University of the State of New York,

Defendants-Appellants.

Judgment of Affirmance.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro
Clerk

by
Vincent A. Carlin
Chief Deputy Clerk

Opinion of the District Court.

Edward Weinfeld, District Judge.

Plaintiffs commenced this action for a judgment declaring unconstitutional the New York State Education Law, section 6524(6), and the rules and regulations promulgated thereunder which (1) require that a physician, to be licensed to practice medicine in the state, must be either a citizen of the United States or file a declaration of intent to become a citizen, and (2) terminate any such license upon the alien physician's failure to become a citizen within ten years of licensure.[1] Since the material facts are not in dispute, the parties agree that the matter is ripe for summary disposition pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiffs, eight physicians, citizens of Turkey, are all resident aliens of the United States and have been licensed to practice medicine by the State of New York under the challenged provision. They were individually licensed on various dates during the period of 1965 to 1971 and are

---

[1] §6524 provides:

"To qualify for a license as a physician, an applicant shall fulfill the following requirements: (6) Citizenship: be a United States citizen, or file a declaration of intention to become a citizen unless such requirement is waived, in accordance with the commissioner's regulations: . . . ."

This section replaced former § 6509, which was repealed in 1971 and which provided:

"There shall be issued to an applicant who, when admitted to the licensing examination, was a citizen of a foreign country, and who had declared intention of becoming a citizen of the United States, upon passing the examination, a license but upon failure of such licensee within ten years from the date of such declaration of intention to furnish evidence that he has become a citizen his license shall terminate and his registration shall be annulled."

The requirement of termination at the end of ten years of citizenship is not demonstrated is now embodied in a regulation of the Commissioner of Education, 8 NYCRR § 24.7.

practicing their particular disciplines both privately and at medical institutions. The license of each specifies the date by which citizenship is "required" and each is in imminent danger of revocation of his license under the challenged provision on the sole ground that he has not become a citizen within the prescribed time period.

The complaint charges that the state regulatory scheme which would deprive plaintiffs, who have already been found qualified as physicians and licensed to practice, of their licenses exclusively on the basis of their alienage violates their constitutional rights to equal protection of the laws and due process under the Fourteenth Amendment,[2] and further that this program interferes with the exclusive federal authority to regulate immigration and naturalization under Article VI of the Constitution.

[1, 2] The defendants, at the threshold, contend that plaintiffs, having obtained the benefits of the licensing statute, are estopped from challenging its constitutionality.[3] However, this doctrine of estoppel is a slender reed for defendants to rely on in their attempt to foreclose plaintiffs' constitutional attack. As the Supreme Court observed recently: "[T]his doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach.'"[4] Plaintiffs, once having been found qualified and licensed to practice, acquired a property right which was entitled to constitutional protection.[5] The

[2] Plaintiffs assert this cause of action under the Fourteenth Amendment and under 42 U.S.C. § 1983.

[3] *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348, 56 S. Ct. 466, 483, 80 L.Ed. 688, 711 (1936).

[4] *Arnett* v. *Kennedy,* 416 U.S. 134, 153, 94 S.Ct. 1633, 1644, 40 L.Ed.2d 15, 33 (1975).

[5] The Supreme Court has consistently held that "[a] State cannot exclude a person from the practice of law or from any other

(footnote continued on following page)

acceptance of the license did not deprive them of the right to challenge the constitutional validity of the ten-year restriction. As the first Mr. Justice Harlan reasoned in *W. W. Cargill Co.* v. *Minnesota:*[6]

> "[T]he acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provision of the statute or with any regulations prescribed by the state . . . that are repugnant to the Constitution of the United States. . . . If the [state] refused to grant a license, *or if it sought to revoke one granted,* because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, *the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings.*" [emphasis added.]

The court holds plaintiffs are not debarred from attacking the provision requiring citizenship within a ten-year period, absent which their licenses are subject to revocation.

We now turn to the merits of plaintiffs' claims. Initially they contend that the defendants' threatened and present enforcement of the statute "arbitrarily and irrationally

(footnote continued from preceding page)

occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 752 (1957). *Cf. Greene* v. *McElroy,* 360 U.S. 474, 492, 79 S.Ct. 1400, 1411. 3 L.Ed2d 1377, 1388 (1959) in which the Court held that "[the] right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *United States* v. *Briggs,* 514 F.2d 794, 798 (5th Cir. 1975).

[6] 180 U.S. 452, 468, 21 S.Ct. 423, 429, 45 L.Ed. 619, 626 (1901).

discriminate against, and separately classify and treat, the plaintiffs solely on the basis of their alienage" in violation of the equal protection clause of the Fourteenth Amendment.

The issue so presented seemingly was put at rest in *In re Griffiths*,[7] where the Supreme Court held unconstitutional Connecticut's exclusion of aliens from admission to practice law. The Court premised its judgment upon basic constitutional concepts: first, that a lawfully admitted resident alien is a "person" within the Fourteenth Amendment's prohibition against denial "to any person within its jurisdiction the equal protection of the laws";[8] second, that the "right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure";[9] third, that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny";[10] fourth, that a state which adopts a suspect classification "bears a heavy burden of justification";[11] and fifth, that "to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionality permissible and substantial and that its use is 'necessary . . .to the accomplishment' of its purpose or the safeguarding of its interest."[12]

---

[7] 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

[8] *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220, 226 (1886).

[9] *Truax* v. *Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131, 135 (1915).

[10] *Graham* v. *Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534, 541 (1971).

[11] *McLaughlin* v. *Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222, 231 (1964).

[12] *In re Griffiths*, 413 U.S. 717, 721-22, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910, 915 (1973).

The state, in its effort to overcome the force of *In re Griffiths*, urges that the traditional "rational relationship test"[13] is the standard to be applied in determining constitutionality. Thus, it argues that the state does admit alien physicians to practice and that it is reasonable to require them within ten years, which is asserted as a reasonable period to expect a professional to become established in practice, to demonstrate a political commitment to this country and the community within which they reside and practice their profession. The argument proceeds further —that it is reasonable for the state to encourage physicians, because of their education, talent and the esteem in which they are generally held, to fully participate in public affairs; and finally, the state, in its attempt to sustain its heavy burden of justification, argues that a political commitment to the United States will serve to promote stability in the treatment of patients, since a physician who remains a "sojourner" rather than a citizen is more likely than the latter to remove from the country, leaving his patients to become familiar with another doctor. The short answer to the state's labored argument is that a physician's commitment to the ancient and universal oath of Hippocrates, rather than a political commitment to the United States, is more likely to secure his continued dedication to the interests of his patients and the welfare of the community at large. A physician's participation in political affairs has no bearing on his dedication to his patients' concern. There is not the slightest link between a physician's citizenship and his competency as a physician or surgeon.

[3] The state, of course, has a substantial interest to assure that only those who are professionally and morally qualified minister to the needs of the mentally and physically ill. But whether the rational relationship test, as

---

[13] *E.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 398 (1961).

the state urges, or the compelling or overriding state interest test is the proper standard,[14] the conclusion is compelled that the state's requirement of citizenship as a condition of continued licensure after it has already found an alien physician qualified and licensed him to practice his profession bears no logical relationship to his continued professional competence and thus lacks a rational basis. The requirement of citizenship after ten years of licensure is not to test or determine the physician's professional competence; that was decided when the plaintiffs were previously licensed by the state and permitted to minister to the ill in the community. Their competency during that period in no respect depended upon their citizenship. Each now has the advantage of additional years of experience. If anything, this experience makes them better qualified than when they were first granted their licenses. Thus the instant case is even stronger than *In re Griffiths*, where the state sought to justify *exclusion* of aliens from the practice of law; here the state seeks to justify expulsion from the practice of medicine after having found plaintiffs qualified and permitted them to practice for ten years, during which period they were subject to disciplinary action for any professional misconduct. The state's attempted justification is without substance and accordingly the court decrees section 6524(6) of the State Education Law and the rules and regulations promulgated thereunder unconstitutional as an unlawful discrimination against resident aliens, in violation of the equal protection clause of the Fourteenth Amendment.[15]

---

[14] *See In re Griffiths*, 413 U.S. 717, 722 n. 9, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910, 915 (1973).

[15] *See, e. g., Sugarman* v. *Dougall*, 413 U.S. 634, 646, 93 S.Ct. 2842, 2849, 37 L.Ed.2d 853, 862 (1973); *C. D. R. Enterprises, Ltd.* v. *Board of Educ.*, —— F.Supp. ——, 1976 (E.D.N.Y. 3-judge

(footnote continued on following page)

This disposition makes is unnecessary to consider plaintiffs' further argument that the act is unconstitutional because it interferes with the exclusive federal power over aliens.

[4] Plaintiffs' motion for summary judgment is granted, but only as to the individual defendants, since the defendants State of New York and the New York State Education Department are not amenable to suit.[16]

(footnote continued from preceding page)

3-judge court); *Ramos* v. *U. S. Civil Serv. Comm.* 376 F.Supp. 361, 3-judge court) ;*Ramos* v. *U. S. Civil Serv. Comm.* 376 F.Supp. 361, 367 (D.P.R. 1974); *Arias* v. *Exam. Bd.*, 353 F.Supp. 857, 862 (D.P.R. 1972); *Mohamed* v. *Parks*, 352 F.Supp. 518, 520-21 (D.Mass. 1973); *Teitscheid* v. *Leopold*, 342 F.Supp. 299, 302-03 (D.Vt. 1971) .

[16] Plaintiffs brought this action under the Fourteenth Amendment and under 42 U.S.C. § 1983. However, as plaintiffs now concede, the state and any branch thereof are not "persons" within the meaning of § 1983. *See Monroe* v. *Pape*, 365 U.S. 167, 191, 81 S.Ct. 473, 486, 5 L.Ed.2d 492, 507 (1961); *Erdmann* v. *Stevens*, 458 F.2d 1205, 1208 (2d Cir. 1972); *Meyer* v. *State of New York*, 344 F.Supp. 1377, 1378 (S.D.N.Y. 1971). And the state has not consented to suit so that this action is barred as to the defendants State of New York and New York State Education Department. *Edelman* v. *Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662, 672 (1974).

Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT

FILED

MAY 18, 1976

S.D.N.Y.

75 Civil 4520

SUPHI SURMELI, GEVHER TURKAN ATAYALVAC, CEVAT NEZIROGLU, NEJAR CAGINALP, ALI MUSHIN TOSYALI, SUNGER TECE, SEMITH H. GUNDAR, and ALI GOKHAN,

Plaintiffs,

—against—

THE STATE OF NEW YORK; NEW YORK STATE EDUCATION DEPARTMENT; EWALD B. NYQUIST, as Commissioner of Education of the State of New York; JOSEPH W. McGOVERN, EVERETT J. PENNY, ALEXANDER J. ALLAN, JR., CARL H. PFORZHEIMER, EDWARD M. M. WARBURG, JOSEPH T. KING, JOSEPH C. INDELICATO, HELEN B. POWER, FRANCIS W. McGINLEY, KENNETH B. CLARK, HAROLD R. NEWCOMB, THEODORE M. BLACK, WILLARD A. GENRICH and EMLYN I. GRIFFITH, constituting THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Defendants.

Plaintiffs having moved for summary judgment declaring New York State Education Law § 6524(6) and the rules and regulations promulgated thereunder including 8 New York Code Rules and Regulations § 24.7 unconstitutional,

Judgment.

and the Court having filed its written opinion dated April 7, 1976 granting plaintiffs' motion except as to defendants The State of New York and The New York State Education Department;

It is ORDERED, ADJUDGED AND DECLARED that:

1. Plaintiffs' motion for summary judgment is granted, except as to defendants The State of New York and the New York State Education Department;

2. New York State Education Law § 6524(6) and the rules and regulations promulgated thereunder, including 8 New York Code Rules and Regulations § 24.7, are unconstitutional under the Fourteenth Amendment of the United States Constitution;

3. Plaintiffs shall recover of all defendants except the State of New York and the New York State Education Department, jointly and severally, costs of this action, and it is further

Ordered that the judgment entered by the Clerks of the Court on April 9, 1976 is vacated.

Dated: New York, New York
May 17, 1976

JUDGMENT ENTERED—5/18/76

s/ RAYMOND F. BURGHARDT
Clerk of the Court

The foregoing is approved as to form.

s/ EDWARD WEINFELD
U.S.D.J.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1163

EWALD B. NYQUIST, as Commissioner of Education of the STATE OF NEW YORK, JOSEPH W. MCGOVERN, EVERETT J. PENNY, ALEXANDER J. ALLAN, JR., CARL H. PFORSHEIMER, EDWARD M. M. WARBURG, JOSEPH T. KING, JOSEPH C. INDELICATO, HELEN B. POWER, FRANCIS W. MCGINLEY, KENNETH B. CLARK, HAROLD E. NEWCOMB, THEODORE M. BLACK, WILLARD A. GENRICH and EMLYN I. GRIFFITH, constituting THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Petitioners,

against

SUPHI SURMELI, GEVHER TURKAN ATAYALVAC, CEVAT NEZIROGLU, NEJAR CAGINALP, ALI MUSHIN TOSYALI, SUNGER TECE, SEMIH H. GUNDAY, and ALI GOKHAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

ASHER B. LANS
Attorney for Respondents
555 Madison Avenue
New York, New York 10022
(212) 421-0700

ROBERT STEPHAN COHEN
DEBORAH E. LANS
LANS FEINBERG & COHEN
Of Counsel

March 22, 1977

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1163

EWALD B. NYQUIST, as Commissioner of Education of the STATE OF NEW YORK, JOSEPH W. MCGOVERN, EVERETT J. PENNY, ALEXANDER J. ALLAN, JR., CARL H. PFORSHEIMER, EDWARD M. M. WARBURG, JOSEPH T. KING, JOSEPH C. INDELICATO, HELEN B. POWER, FRANCIS W. MCGINLEY, KENNETH B. CLARK, HAROLD E. NEWCOMB, THEODORE M. BLACK, WILLARD A. GENRICH and EMLYN I. GRIFFITH, constituting THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Petitioners,

against

SUPHI SURMELI, GEVHER TURKAN ATAYALVAC, CEVAT NEZIROGLU, NEJAR CAGINALP, ALI MUSHIN TOSYALI, SUNGER TECE, SEMIH H. GUNDAY, and ALI GOKHAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 24, 1976, summarily affirming the judgment of the United States District Court for the Southern District of New York, entered May 18, 1976.

Opinions Below

The decision of the Court of Appeals was rendered without opinion and is not yet reported; a copy of the order of affirmance appears in Petitioners' Appendix at page 1a. The opinion of the United States District Court for the Southern District of New York is reported at 412 F. Supp. 394 and appears at page 3a of the Appendix. The judgment of the District Court appears at page 10a.

Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Did the courts below err in holding that New York's requirement that all physicians be or shortly become citizens in order to acquire or retain medical licensure is repugnant to the Equal Protection Clause of the United States Constitution since country of citizenship bears no relationship to a physician's ability to practice medicine?

2. Can the mere acceptance of medical licensure estop Respondents from challenging a state's constitutionally repugnant statutory discrimination against aliens where Petitioners cannot show any substantial change in position?

3. Did the courts below commit reversible error in declining to rule upon the Supremacy Clause claim because of the courts' disposition of the litigation upon Equal Protection grounds, where both claims were of constitutional

dimension, and the courts in alienage cases have consistently deferred decision on Supremacy Clause claims in order to determine other constitutional issues first?

4. Are state regulations imposing a citizenship requirement upon licensure for physicians repugnant to the exclusive federal authority to control immigration and naturalization, which authority forbids the imposition of special burdens upon employment of aliens?

Constitutional Provisions, Statutes and Regulations Construed

The constitutional provisions, statutes and regulations construed are set forth in the Petition, pp. 3-4.

Statement of the Case

Petitioners seek review of a judgment of the Court of Appeals for the Second Circuit (1a) which affirmed a judgment of the District Court for the Southern District of New York (Hon. Edward Weinfeld, J.) declaring unconstitutional New York Education Law §6525(6), former §6509 and 8 N.Y.C.R.R. §24.7, which provide that aliens licensed as physicians are subject to revocation of their licenses unless they acquire United States citizenship within ten years of licensure (10a).

The facts are not in dispute. Respondents are all lawfully admitted resident aliens and physicians duly licensed to practice medicine in the State of New York (3a). Each is in imminent danger of having his or her medical license revoked by virtue of the challenged statutes and regulation

(3a-4a). Petitioners are the Commissioner of Education and the members of the Board of Regents, the officials charged with enforcing the statutes and regulation in issue.

The challenged provisions (a) require all aliens seeking licensure as physicians to demonstrate United States citizenship or file a declaration of intention to become a citizen in order to qualify for licensure and (b) mandate revocation of the licensure of any alien qualifying under the declaration of intention provision if he or she fails to acquire citizenship within ten years of licensure (4a).*

These provisions were challenged below as denying Respondents the equal protection and due process of the laws and as a constitutionally impermissible interference with the exclusive federal authority to regulate immigration and naturalization.

Respondents moved below for summary judgment. The District Court granted the motion, declaring the statutes and regulation to be in violation of the Equal Protection Clause (8a). The Court declined, under the circumstances, to reach Respondents' remaining arguments (9a).**

---

* Thus, Respondents are allowed to practice for a ten year period, to gain additional experience and competence, to become members of the medical community and to acquire the respect and confidence of their patients, only to have all of the foregoing destroyed by revocation of their licensure solely by reason of their alienage, a characteristic unrelated to the state's legitimate goals in imposing licensing requirements.

** In the District Court, Petitioners had argued in a footnote to their Memorandum of Law that the Supremacy Clause question should be reached first, although that contention was not raised again on oral argument of the motion for summary judgment.

Reasons for Denying the Petition for Certiorari

I.

The Courts Below Properly Held That Under This Court's Decisions the Citizenship Requirement Unconsitutionally Denies Respondents the Equal Protection of the Laws.

The constitutional issue decided below has long been settled by this Court. Classifications based upon alienage have been held to be inherently suspect and subject to close judicial scrutiny. *Examining Board of Engineers, Architects and Surveyors* v. *de Otero*, — U.S. —, 44 U.S.L.W. 4890 (1976).

The leading case in the area of professional licensure is *Application of Griffiths*, 413 U.S. 717 (1973), an action by a resident alien challenging a Connecticut state court rule restricting admission to the legal bar to United States citizens. In the course of its opinion, which held the citizenship requirement to be violative of the Equal Protection Clause, the Court urged that:

> "In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.*, at 721-2.*

---

* Indeed, the Constitutional violation at bar is far more flagrant than that in *Griffiths* as the New York statute revokes the vested property right of physicians to practice their profession after ten years of licensure, solely because of alienage.

Also decisive are *Hampton* v. *Mow Sun Wong*, —— U.S. —, 44 U.S.L.W. 4737 (1976)—regulation barring noncitizens from employment in federal competitive civil service held unconstitutional; *Examining Board of Engineers, Architects and Surveyors* v. *de Otero*, — U.S. —, 44 U.S. L.W 4890 (1976)—state prohibition upon licensure of aliens as civil engineers held unconstitutional;* *Sugarman* v. *Dougall*, 413 U.S. 634 (1973)—statute excluding aliens from state civil service appointment held unconstitutional; *Graham* v. *Richardson*, 403 U.S. 365 (1971)—Equal Protection Clause prevents a state from conditioning welfare benefits upon beneficiary's possession of United States citizenship.

It is clear that the statute, regulations and practices at bar cannot withstand constitutional challenge. No legitimate purpose is served by revoking the licenses of noncitizen physicians after a ten year period solely because of their alienage. If such physicians were sufficiently competent to be licensed initially and no professional misconduct has been alleged against them, as here, suspension solely on the basis of alienage can only be viewed as a discrimination without rationale.

The fact that New York permits licensure of aliens in the first instance, but requires the acquisition of citizenship within ten years thereafter as a precondition to retenton of the license, does not save the statute. *See e.g.*,

* In *de Otero, supra*, this Court stated:

"It is with respect to this kind of discrimination that the States have had the greatest difficulty in persuading this Court that their interests are substantial and constitutionally permissible and that the discrimination is necessary for the safeguarding of those interests." *Id.*, at 4900.

Graham v. *Richardson*, 403 U.S. 365 (1971), where the challenged statute only barred aliens from receiving welfare benefits until they had achieved a specified period of residence within the United States; *C.D.R. Enterprises, Ltd.* v. *Board of Education of the City of New York*, 412 F. Supp. 1164 (E.D.N.Y. 1976), *U.S. app. pending; Norwick* v. *Nyquist*, 417 F.Supp. 913 (S.D.N.Y. 1976); *Mauclet* v. *Nyquist*, 406 F.Supp. 1233 (W.D.N.Y. 1976), *U.S. app. pending*.

Petitioners' argument that the state has a vital interest in encouraging full participation in political affairs by physicians is without merit. The state's only legitimate goal in imposing licensure requirements is to insure professional competence. In any event, a physician's lack of citizenship does not disable him or her from speaking publicly on questions of health care, medical ethics or medical procedures. Finally, there is no parallel requirement imposed upon citizen-physicians that they participate in public matters.

Similarly wanting in substance is the state's contention that alien physicians who fail to become citizens are more likely to remove from the country "leaving their patients to become familiar with another doctor" (Pet. p. 9). Indeed, the state's citizenship requirement has the contrary effect of compelling alien physicians to leave the jurisdiction within ten years of licensure. Moreover, although the state might legitimately impose regulations in order to insure the continued New York residence of physicians, it surely cannot constitutionally impose such regulations solely upon aliens.

II.

The Courts Below Correctly Held That Under Settled Decisions of This Court, the Doctrine of Estoppel Does Not Bar Respondents' Claims.

The courts below correctly held that the settled decisions of this Court did not preclude Respondents from challenging the constitutionality of New York Education Law §6525 (6), former §6509 and 8 N.Y.C.R.R. §24.7 merely because they accepted licensure thereunder (4a-5a). This Court has consistently mandated that the doctrine of estoppel have limited application. In *W. W. Cargill* v. *Minnesota*, 180 U.S. 452, 468 (1901), the Court stated:

> "[T]he acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or comply with any of the statute or with any regulations prescribed by the state . . . that are repugnant to the Constitution of the United States. . . . If the [state] refused to grant a license, or *if it sought to revoke one granted*, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, *the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings.*" (emphasis added.)

In *Ashwander, et al.* v. *Tennessee Valley Authority, et al.*, 297 U.S. 288 (1936), defendants argued that the plaintiff-shareholders, suing derivatively, were estopped to challenge the constitutionality of the act creating the T.V.A. because their rights were acquired from the company which had entered into contracts with the T.V.A. and which,

therefore, had accepted benefits under the very statute now challenged. In rejecting the argument, the majority wrote:

> "Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities." *Id.*, at 323.*

At bar, Petitioners can point to no detriment which will befall the state if the constitutional challenge is permitted. Hence, estoppel may not properly be invoked.

Additionally, the Circuit Courts uniformly have ruled that no estoppel may be applied where a plaintiff's sole activity is registration under a statute, as at bar. *North American Co.* v. *Securities & Exchange Commission*, 133 F.2d 148 (2nd Cir. 1943), *aff'd.*, 327 U.S. 668 (1946); *McDonald* v. *Key*, 224 F.2d 608 (10th Cir. 1955), *cert. denied*, 350 U.S. 895 (1955); *National Education Association, Inc.* v. *Lee County Board of Public Instruction*, 467 F.2d 447 (5th Cir. 1972).

---

* *See also, Fahey* v. *Mallonee*, 332 U.S. 245 (1947), where the estoppel concept was limited to a challenge to the "important particulars, hardly severable" from the act under which the challenger seeks to retain benefits. At bar, the citizenship provisions are readily severable from the licensure statutes and unimportant to the state's goal of restricting licensure to qualified physicians.

III.

The Courts Below Did Not Err in Declining to Decide First the Constitutional Supremacy Clause Issue.

Petitioners contend that the courts below erred in declining to decide first the Respondents' claim that the challenged provisions constitute an impermissible interference with the exclusive federal authority to regulate immigration and naturalization and its concomitant aspects.*

Petitioners rely upon *Hagans* v. *Lavine,* 415 U.S. 528 (1974). However, in *Norwick* v. *Nyquist,* 417 F. Supp. 913 (S.D.N.Y. 1976), the Three-Judge Panel held that the *Hagans* procedure should not be followed where the Supremacy Clause claim asserts a conflict between a specific state provision and the general and exclusive federal power to regulate immigration and naturalization, as such a claim derives not from specific federal legislation but the Constitution itself. *Id.,* at 915-916.

Thus, in *Norwick* the Court stated:

> "Typically, the *Hagans* doctrine has been applied to cases in which specific State statutes or regulations are asserted to be in conflict with *specific* federal statutory or regulatory provisions. . . . It was that type of question, resting upon a *statutory comparison,* that *Hagans* denominated a 'Supremacy Clause ('statutory')' issue." *Id.,* at 916 (citations omitted; emphasis added.)

---

* Even assuming, *arguendo,* that error was committed, plainly it was harmless and does not warrant review since in any event the courts would have found the challenged provisions to be unconstitutional. *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.,* 317 U.S. 456, *rearg. denied,* 318 U.S. 798 (1942).

The Court in *Norwick* found authoritative precedent in the numerous cases in which the courts have either declined to reach Supremacy claims or have reached those claims only secondarily. *See e.g., Graham* v. *Richardson,* 403 U.S. 365 (1971); *Sugarman* v. *Dougall,* 413 U.S. 634 (1973); *Teitscheid* v. *Leopold,* 342 F.Supp. 299 (D. Vt. 1971); *Mohamed* v. *Parks,* 352 F.Supp. 518 (D. Mass. 1973); *C.D.R. Enterprises, Ltd.* v. *Board of Education of the City of New York,* 412 F.Supp. 1164 (E.D.N.Y. 1976), *U.S. app. pending.*

Peters v. *Hobby,* 349 U.S. 331 (1955), cited by Petitioners, indicates only a preference for decision of a limited statutory delegation-of-authority issue prior to constitutional claims, where the former will be dispositive. In *DeCanas* v. *Bica,* —— U.S. ——, 44 U.S.L.W. 4235 (1976), the sole issue presented was one of preemption and the procedural point urged at bar was never considered. In *Mathews* v. *Diaz,* —— U.S. ——, 44 U.S.L.W. 4748 (1976), *Hampton* v. *Mow Sun Wong,* —— U.S. ——, 44 U.S.L.W. 4737 (1976), and *Examining Board of Engineers, Architects and Surveyors* v. *de Otero,* —— U.S. ——, 44 U.S.L.W. 4890 (1976), the sole challenges, apart from jurisdictional issues, were based upon the Due Process and Equal Protection Clauses.

IV.

New York Education Law § 6525(6), Former § 6509 and 8 N.Y.C.R.R. § 24.7 Impermissibly Burden the Licensure Rights of Alien Physicians and Hence Unconstitutionally Interfere With the Exclusive Federal Right to Regulate Immigration and Naturalization.

As the Court in *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, at 419 (1948), ruled:

> "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid."

Under this analysis, provisions similar to those at bar have been held impermissibly to interfere with the exclusive federal power. *Truax* v. *Raich*, 239 U.S. 33, at 42 (1915).

At bar, the challenged provisions impose additional burdens, not contemplated by Congress, upon lawfully admitted aliens and hence are alsc invalid under the Supremacy Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Asher B. Lans
Attorney for Respondents
555 Madison Avenue
New York, New York 10022

Robert Stephan Cohen
Deborah E. Lans
Lans Feinberg & Cohen
Of Counsel

March 22, 1977